SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Chase T. Brockstedt, Esquire
Bifferato Gentilotti LLC
119 W. Third Street
Lewes, DE 19958

Mr. Kurt Hensey
20334 Mallory Court
Rehoboth Beach, DE 19971

Mr. Ken Hensey
20287 Fleming Circle
Rehoboth Beach, DE 19971

RE: ***Spanish Tiles, Ltd. Terra Tile & Marble, Steel Buildings, Inc. d/b/a Northern Steel Buildings, Inc. v. Kurt Hensey, Ken Hensey, et al.***
C.A. No. 05C-07-025 RFS

Submitted: December 8, 2008
Decided: January 7, 2008

Gentlemen:

In this civil action, Spanish Tiles, Ltd. ("Spanish Tiles") seeks damages for breach of contract and for various tort claims by a complaint filed on July 14, 2005. The parties, background, and contentions are outlined in two prior opinions and will not be repeated. *See Spanish Tiles, Ltd. v. Hensey et al.* 2005 WL 3981740 (Del. Super.); *Spanish Tiles Ltd. v. Hensey et al.* 2007 WL 1152159 (Del. Super.). Defendants' counsel was permitted to withdraw after a pretrial conference on January 3, 2008. Limited liability companies are required to appear through counsel, *Poore v. Fox Hollow Enterprises,* 1994 WL 150872 (Del. Super.). Despite notice of this requirement, defendants did not retain substitute counsel, and judgment was

subsequently entered against the companies. The remaining defendants are two brothers, Kurt and Ken Hensey (collectively "the Henseys").

At another pretrial conference on May 20, 2008, the Henseys failed to appear. At that time, an order was signed that prohibited the Henseys from presenting irrelevant and prejudicial matters. The gist of the problem was their reported personal attacks on Plaintiff and Plaintiff's counsel rather than on the merits. The order was docketed on Tuesday, May 22, 2008.

Thereafter, on July 23, 2008, the Henseys filed a motion for reargument. They also filed a motion to dismiss the complaint because Spanish Tiles failed to register to do business in Delaware and, therefore, should not be able to sue. After consideration, the motions are denied.

Motion for Reargument

A motion for reargument must be filed within five (5) days from the decision, and the Court does not have the power to enlarge this period. *Langshaw v. Appleby Systems, Inc.* 2006 WL 3026202 (Del. Super.) at *1. Because Superior Court Civil Rule 59(e) states that the motion "shall" be filed within this time frame, the requirement is mandatory. The *pro se* status of the Henseys does not allow them to extend the period from five days to two months. *NTI v. Hall* 2007 WL 3231601 (Del. Com. Pl.) at *2, (*pro se* status does not excuse a failure to comply strictly with . . . court rule . . . and the rules are not suspended thereby.) Since weekends are excluded in the calculation, the five (5) day period ended on Tuesday, May 29, 2008. Consequently, the motion is untimely and must be denied.

In addition, a motion for reargument "will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision." *Kennedy v. Invacare Corp.*,

2006 WL 488590 (Del. Super.) at *1. Neither the law nor the facts were overlooked or misapprehended. The Henseys seek to add emails as exhibits that were not part of the pretrial stipulation as represented by their former counsel last January in preparation for trial. The issues for trial are listed by this stipulation and establish the parameters for the last stages of this litigation. Later, judgment was entered against the company defendants. The remaining issues on the claims of Spanish Tiles are only whether the Henseys have personal responsibility for the contract and/or for the tort claims.

In this aspect, on the contract claim, the question is whether the Henseys made promises or signed the contract personally rather than in their capacities as agents of the companies, *see Thomas v. Hobbs d/b/a Tara Venture, LLC*, 2005 WL 1653947 (Del. Super.) at *2, (as with a corporation, a member of a limited liability company may not be held liable for the debts, obligations, and liabilities of the company). Regarding the tort claims, the deciding factor is whether or not the Henseys personally participated in the torts of the entities, *see Brasby v. Morris* 2007 WL 949485 (Del. Super.) at *8. (The personal participation doctrine attaches liability to corporate officers for torts which "they 'commit, participate in, or inspire, even though they are performed in the name of the corporation' . . . [I]ndividual liability attaches only where an officer 'directed, ordered, ratified, approved, or consented to' the tortious act in question.") Although the *Brasby* case involved a corporation, the reasoning of the personal participation doctrine applies to the limited liability context. In fact, Spanish Tiles has submitted a jury instruction about this point.

The Henseys want to use emails as if judgment had not already been entered against the companies. This effort comes too late. Aside from the entry of judgment, the pretrial stipulation

did not reference them although other documents were identified as exhibits. If the emails are relevant to whether or not the Henseys had personal responsibility on the contract or tort claims, then I will rule on their admissibility at trial. Further, the emails may or may not bear on issues of credibility, but this kind of situation is best left for the time of impeachment.

Former counsel for defendants filed an Amended Counterclaim with multiple counts. Only two counts appear to be assertable by the Henseys for themselves and those involve slander in Count V and breach of an alleged lot discount transaction in Count VI. The emails referenced in the Henseys' motion do not appear to be relevant to these allegations. The other counts belong to the company defendants alone which cannot be litigated without counsel.

The Second Motion to Dismiss

In the opinion of March 30, 2005, a motion to dismiss and a motion for a more definite statement were denied. The Revised and Stipulated Scheduling Order dated November 2, 2007 provided that dispositive motions must be filed by December 7, 2007. As indicated, the Henseys were represented by counsel at that time. On July 22, 2008, the Henseys asked the Court to dismiss the complaint because Spanish Tiles was not qualified to do business in Delaware. This claim should have been asserted earlier.

A motion of this nature attacks the capacity of Spanish Tiles to sue. Under Superior Court Civil Rule 9(a), defendants were required to raise the issue by a specific negative averment, supported by an affidavit with particular information within defendants' knowledge. This procedure was not followed in this case, *see Financeamerica Private Brands, Inc. v. Harvey Hall, Inc.* 366 A.2d 836, 838 (Del. Super. 1976); *G.R. Sponaugle & Sons, Inc. v. McKnight Construction Co.*, 304 A.2d 339 (Del. Super. 1973). (An objection to capacity to sue is "a matter

of abatement" and, as such, it falls within the class of threshold defenses which must be raised and disposed of at the outset of the suit.)

Nor does the motion appear to have any merit. Foreign corporations which do business in Delaware must register with the Secretary of State and cannot sue if they fail to do so. 8 *Del.C.* § 383(a). It has not been contested from the filing of this complaint on July 14, 2005, with over two years for discovery, that Spanish Tiles was doing business in Delaware. Section 383 does not apply if a corporation is not "doing business" in Delaware. *Coyle v. Peoples*, 349 A.2d 870, 873 (Del. Super.), aff'd., 372 A.2d 539 (Del. 1977). Spanish Tiles does not appear to have done business in Delaware. If there was a genuine interest in the approach, it should have been initiated in the proper manner and at the beginning of the litigation and certainly no later than the times established by the first and Revised and Stipulated Scheduling Orders.

Considering the foregoing, the Henseys' motions for reargument and to dismiss are denied. The Henseys asked that the default judgment against the companies be vacated because of the alleged failure to Spanish Tiles to register. As that effort was not successful, the request to vacate must fail as well.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary